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9110-9M

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[DHS Docket No. DHS-2019-0036]

Designating Aliens for Expedited Removal

AGENCY: Office of the Secretary, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This Notice (this Notice) enables the Department of Homeland Security (DHS) to exercise the full remaining scope of its statutory authority to place in expedited removal, with limited exceptions, aliens determined to be inadmissible under sections 212(a)(6)(C) or (a)(7) of the Immigration and Nationality Act (INA or the Act) who have not been admitted or paroled into the United States, and who have not affirmatively shown, to the satisfaction of an immigration officer, that they have been physically present in the United States continuously for the two-year period immediately preceding the date of the determination of inadmissibility. Presently, immigration officers can apply expedited removal to aliens encountered anywhere in the United States for up to two years after the alien arrived in the United States, provided that the alien arrived by sea and the other conditions for expedited removal are satisfied. For aliens who entered the United States by crossing a land border, the Secretary of Homeland Security has exercised his discretion under the INA to permit the use of expedited removal if the aliens were encountered by an immigration officer within 100 air miles of the United States international land border and were continuously present in the United States for less than 14 days immediately prior to that encounter. The INA grants the Secretary of Homeland Security the “sole and unreviewable discretion” to modify at any time the discretionary limits on the scope of the expedited removal designation. The Acting

Secretary of Homeland Security is exercising his statutory authority through this Notice to designate for expedited removal the following categories of aliens not previously designated: (1) aliens who did not arrive by sea, who are encountered anywhere in the United States more than 100 air miles from a U.S. international land border, and who have been continuously present in the United States for less than two years; and (2) aliens who did not arrive by sea, who are encountered within 100 air miles from a U.S. international land border, and who have been continuously present in the United States for at least 14 days but for less than two years. Therefore, the designation in this Notice (the New Designation) harmonizes the authorization for aliens arriving by land with the existing authorization for aliens arriving by sea. The effect of that change will be to enhance national security and public safety—while reducing government costs—by facilitating prompt immigration determinations. In particular, the New Designation will enable DHS to address more effectively and efficiently the large volume of aliens who are present in the United States unlawfully, without having been admitted or paroled into the United States, and ensure the prompt removal from the United States of those not entitled to enter, remain, or be provided relief or protection from removal.

DATES: This Notice, including the New Designation, is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Interested persons are invited to submit written comments on this Notice on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Docket Number DHS-2019-0036 using the Federal e-Rulemaking Portal at <https://www.regulations.gov>. See the “Public Participation and Request for Comments” portion of the SUPPLEMENTARY INFORMATION for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ihsan Gunduz, Policy Analyst, Office of Policy, Department of Homeland Security, 202-282-9708.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

The Department of Homeland Security (DHS) is requesting public comments on the substance of this Notice as a matter of discretion. As discussed in Section D below, the Administrative Procedure Act's (APA) notice-and-comment requirements do not apply to this Notice, and the New Designation is effective immediately upon publication. However, DHS believes that by maintaining a dialogue with interested parties, DHS can ensure that it is even more effective in addressing the significant national security and public safety interests implicated with respect to aliens present in the United States who entered the United States without admission or parole and have been continuously present in the United States for at least 14 days but less than two years after their entry regardless of where in the U.S. they are encountered, and those continuously present for up to 14 days who are encountered more than 100 miles from a land border, while at the same time continuing to ensure appropriate procedural safeguards for affected individuals.

We encourage commenters to submit comments through the Federal e-Rulemaking Portal at <https://www.regulations.gov>. Please follow the website instructions for submitting comments. If you cannot submit your comments using the Federal e-Rulemaking Portal, please contact the person in the FOR FURTHER INFORMATION CONTACT section of this notice for alternate instructions.

Comments received by means other than those listed above or comments received after the comment period has closed will not be reviewed. Comments posted on the Federal e-Rulemaking portal are available and accessible to the public. All comments received will be posted without

change on <https://www.regulations.gov>. Commenters should not include personal information such as Social Security Numbers, personal addresses, telephone numbers, and e-mail addresses in their comments as such information will become viewable by the public on the <http://www.regulations.gov> website. It is the commenter's responsibility to safeguard his or her information.

II. Background

A. DHS Statutory Authority over Expedited Removal Proceedings

Under section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1), DHS¹ may remove, without a hearing before an immigration judge, certain aliens arriving in the United States at a port of entry, and certain other aliens (as designated by the Secretary of Homeland Security and as discussed more below) who are inadmissible under sections 212(a)(6)(C) or 212(a)(7) of the INA, 8 U.S.C. 1182(a)(6)(C) or 1182(a)(7). Sections 212(a)(6)(C) and 212(a)(7) of the INA designate aliens as inadmissible if they lack valid documents that are necessary for admission, or if they have ever fraudulently or willfully misrepresented a material fact to acquire admission to the United States, including whether they are a U.S. citizen, or to procure a visa or other immigration-related documentation. Unaccompanied alien children, as defined in 6 U.S.C. 279(g)(2), may not be placed in expedited removal under current law.² See 8 U.S.C. 1232(a)(5)(D).

The Secretary, in his "sole and unreviewable discretion," may designate certain aliens to

¹ The INA provided the Attorney General those authorities; however, under section 1517 of title XV of the Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, 116 Stat. 2135, any reference to the Attorney General in a provision of the INA describing functions that were transferred from the Attorney General or other Department of Justice official to DHS by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. See 6 U.S.C. 557 (2003) (codifying HSA, tit. XV, sec. 1517); 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

² In certain limited circumstances, an unaccompanied alien child who is a national or habitual resident of a contiguous country (i.e., Mexico or Canada) may be permitted to withdraw his or her application for admission to the United States and return to such contiguous country without a removal hearing. See 8 U.S.C. 1232(a)(2).

whom the expedited removal provisions may be applied. INA section 235(b)(1)(A)(iii)(I), 8 U.S.C. 1225(b)(1)(A)(iii)(I); 8 CFR 235.3(b)(1)(ii). The statute provides that the Secretary may apply (by designation) expedited removal to any alien “who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility. . . .” INA section 235(b)(1)(A)(iii)(II), 8 U.S.C. 1225(b)(1)(A)(iii)(II). In other words, Congress provided the Secretary, in his sole and unreviewable discretion, the authority to apply expedited removal to aliens inadmissible under INA section 212(a)(6)(C) or 212(a)(7), who had not been admitted or paroled and who could not prove that they have been continuously present in the United States for two years.

In 1997, the Attorney General promulgated a regulation applying expedited removal to aliens arriving in the United States at a port-of-entry and aliens interdicted in international or United States waters. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 10,312 (Mar. 6, 1997) (the 1997 Regulation). The 1997 Regulation also delegated the Attorney General’s authority to the Commissioner of the former Immigration and Naturalization Service (INS) and established a mechanism for later designations of aliens subject to expedited removal. See id. The Attorney General “emphasized that a proposed expansion of the expedited removal procedures may occur at any time and may be driven either by specific situations such as a sudden influx of illegal aliens motivated by political or economic unrest or other events or by a general need to increase the effectiveness of enforcement operations at one or more locations.” See id.

In 2002, the Commissioner of the INS invoked this authority to designate as eligible for

expedited removal aliens who arrived in the United States by sea, were not paroled or admitted into the United States, and “who have not been physically present in the United States continuously for the two-year period prior to the determination of inadmissibility under” the Notice. Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(a)(iii) of the Immigration and Nationality Act, 67 FR 68923 (Nov. 13, 2002) (the 2002 Notice). Under the 2002 Notice, immigration officers could apply expedited removal to aliens encountered anywhere in the United States for up to two years after the alien arrived in the United States, as long as the alien arrived by sea and the other conditions for expedited removal were satisfied.

In 2004, the Secretary designated additional aliens for expedited removal through a Federal Register notice, pursuant to which DHS officials could apply expedited removal to aliens encountered within 100 air miles of the border and within 14 days of their date of entry regardless of the alien’s method of arrival, as long as the other conditions for expedited removal were satisfied. Designating Aliens for Expedited Removal, 69 FR 48877 (Aug. 11, 2004) (the 2004 Notice, and, together with the 1997 Regulation and the 2002 Notice, collectively the Previous Designations); see also Eliminating Exception To Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea, 82 FR 4902 (Jan. 17, 2017). The 2004 Notice explained that in the interest of focusing limited resources “upon unlawful entries that have a close spatial and temporal nexus to the border,” the 2004 Notice did not implement “the full nationwide expedited removal authority available to DHS.” It did, however, expressly reserve to DHS the option of “implementing the full nationwide enforcement authority of the statute through publication of a subsequent Federal Register notice.” Designating Aliens for Expedited Removal, 69 FR at 48879.

In recent years, increasing numbers of aliens have been detained after being apprehended within the interior of the United States, necessitating a change in the focus of limited government

resources to include the use of expedited removal proceedings for aliens apprehended within the U.S. interior, as well as near the border.

Aliens otherwise subject to expedited removal who indicate either an intention to apply for asylum or a fear of persecution or torture will be given further review by an asylum officer including an opportunity to establish a “credible fear,” and thus potential eligibility for asylum. INA section 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i); 8 CFR 235.3(b)(4). Further, an alien otherwise subject to expedited removal is “given a reasonable opportunity to establish to the satisfaction of the examining immigration officer that he or she was admitted or paroled into the United States.” 8 CFR 235.3(b)(6). Aliens who have not been admitted or paroled and who are subject to expedited removal have the burden of proving that they are not inadmissible and satisfy the continuous physical presence requirement. 8 CFR 235.3(b)(1)(ii). Any absence from the United States serves to break the period of continuous physical presence. Id. Aliens determined by immigration officers to be subject to expedited removal nonetheless will receive prompt review of that determination if they claim under oath, after being warned of the penalties for perjury, that they have been admitted for permanent residence, admitted as a refugee, granted asylum, or are a U.S. citizen. INA section 235(b)(1)(C), 8 U.S.C. 1225(b)(1)(C); 8 CFR 235.3(b)(5)(i).

B. DHS Need for the New Designation

In light of the ongoing crisis at the southern border, the large number of aliens who entered illegally and were apprehended and detained within the interior of the United States, and DHS’s insufficient detention capacity both along the border and in the interior of the United States, DHS is issuing the New Designation to use more effectively and efficiently its limited resources to fulfill its mission to enforce the immigration laws and ensure the security of the Nation’s borders. See INA section 103(a)(5), 8 U.S.C. 1103(a)(5); 6 U.S.C. 202; Exec. Order 13767, Border Security and

Immigration Enforcement Improvements, 82 FR 8793, section 1 (Jan. 25, 2017) (Border Security E.O.) (“Border security is critically important to the national security of the United States. Aliens who illegally enter the United States without inspection or admission present a significant threat to national security and public safety.”). Fully exercising DHS’s statutory expedited removal authority to include certain aliens who would not be subject to expedited removal under the Previous Designations will provide to DHS officers a valuable tool to fulfill their mission.

Fully implementing expedited removal will help to alleviate some of the burden and capacity issues currently faced by DHS and DOJ by allowing DHS to remove certain aliens encountered in the interior more quickly, as opposed to placing those aliens in more time-consuming removal proceedings. Indeed, many of the aliens previously encountered in the interior of the United States likely would have been eligible for expedited removal under this Notice. In Fiscal Year (FY) 2018, 37% (20,570) of ICE’s 54,983 total interior encounters, with entry dates, were of aliens who had been present in the United States for less than two years. Through March 30, 2019, 39% (6,410) of U.S. Immigration and Customs Enforcement’s (ICE) 15,328 total interior encounters, with entry dates, in FY2019 were aliens who had been present in the United States for less than two years. ICE estimates that a significant number of the aliens it encounters in the interior likely would have been eligible for expedited removal had DHS used its discretion to exercise its full statutory authority. Placing certain aliens apprehended in the interior of the United States in expedited removal would allow ICE to more effectively use its limited detention resources. In FY 2018, the average time in DHS custody for aliens placed in expedited removal was 11.4 days. Conversely, for inadmissible aliens encountered in the interior of the United States and placed into full removal proceedings, the average time in DHS custody was 51.5 days. Under the New Designation, ICE will be able to use expedited removal for certain aliens who it arrests in the

interior, which will likely result in those aliens spending less time in ICE detention than if they were placed in full removal proceedings. That, in turn, will more quickly make available additional ICE bed space, which can be used for additional interior arrests and removals.

Additionally, the Acting Secretary of Homeland Security has determined that the implementation of additional measures is a necessary response to the ongoing immigration crisis. Presently, U.S. Border Patrol and ICE lack sufficient detention capacity and resources to detain the vast majority of aliens DHS apprehends along the southern border. As a result, hundreds of thousands of aliens are released into the interior of the United States, pending the outcome of their immigration proceedings. However, by more effectively utilizing ICE's limited resources, more aliens apprehended along the southern border likely will be able to be detained in ICE custody, where they can be more quickly processed and removed from the country than if they had been released into the interior of the United States. The New Designation will also allow ICE to place into expedited removal certain aliens that cross the border illegally but evade apprehension due to vulnerabilities in border operations resulting from U.S. Border Patrol's lack of sufficient resources.

Additionally, immigration courts nationwide are experiencing a historic backlog of removal cases, and non-detained cases are taking years to complete. In June 2019, EOIR reported a total of 909,034 pending immigration cases. By contrast, there were fewer than 168,000 cases pending at the end of Fiscal Year 2004 when DHS exercised its discretion to apply expedited removal to certain aliens encountered within 100 miles of the border who could not establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously for the previous 14 days. The current number of pending immigration cases represents a substantial increase of the number of cases pending completion in 2004, notwithstanding the 2004 Notice. Moreover, the average non-detained alien's removal proceeding has been pending for more than

two years before an immigration judge. That backlog includes many cases involving aliens who were encountered by an immigration officer during the two-year period after they illegally entered the United States, but who were not covered by a Previous Designation. DHS expects that the New Designation will help mitigate additional backlogs in the immigration courts and will reduce the significant costs to the government associated with full removal proceedings before an immigration judge, including the costs of a longer detention period and government representation in those proceedings. DHS acknowledges that it will need to devote certain additional resources to implement this Notice, including by making credible fear determinations for certain aliens placed in expedited removal proceedings. Nonetheless, DHS anticipates that the mitigation of additional backlogs in the immigration courts, the reduction of costs associated with placing aliens in full removal proceedings, and the ability to use limited resources and detention capacity more effectively outweighs any additional costs to the government.

Under this Notice, the Acting Secretary is designating as eligible for expedited removal: (1) aliens who did not arrive by sea, who are encountered anywhere in the United States more than 100 air miles from a U.S. international land border, and who have been continuously present in the United States for less than two years; and (2) aliens who did not arrive by sea, who are encountered within 100 air miles from a U.S. international land border, and who have been continuously present in the United States for at least 14 days but for less than two years. The designation under the 2004 Notice restricting expedited removal to those encountered within 100 miles of the border makes insufficient use of the authorities Congress has granted to address the current immigration crisis, the large number of aliens illegally present in the United States, insufficient DHS resources, and the backlog of removal cases before immigration judges and the Board of Immigration Appeals. The statute places no geographic limitation on the application of expedited removal. DHS has anecdotal

evidence, moreover, that many aliens who have been smuggled into the United States hide in “safe houses” that are located more than 100 miles from the nearest land border. For instance, in 2019, ICE conducted a “knock and talk” of a safe house in Roswell, New Mexico, which is more than 100 miles from the nearest land border, and encountered 67 illegal aliens, resulting in arrests and numerous charges. In 2018, ICE executed a search warrant at a safe house in San Antonio, Texas, during an extortion attempt tied to a human smuggling event, resulting in the rescue of three victims and arrests and charges against the subjects with alien smuggling.

Under the Previous Designations, DHS officers could not apply expedited removal to those individuals, thus limiting the availability of an important authority that Congress has granted to DHS for quickly and efficiently removing certain inadmissible aliens. Under this Notice, DHS anticipates that this broader use of expedited removal orders will reduce incentives not only to enter unlawfully but also to attempt to travel quickly into the interior of the United States in an effort to avoid the application of expedited removal. It will also accelerate the processing of covered inadmissible aliens, because expedited removal does not entail merits hearings before an immigration judge or appeals to the Board of Immigration Appeals except upon positive fear determinations. Therefore, designating aliens encountered anywhere in the United States, who are not subject to a Previous Designation, will help to ensure efficient removal from the United States of aliens who cannot establish a credible fear of persecution or torture.

DHS has determined that the volume of illegal entries, and the attendant risks to national security and public safety presented by these illegal entries, warrants this immediate implementation of DHS’s full statutory authority over expedited removal. This Notice will ensure that those individuals present in the United States without being admitted or paroled, particularly those who evade apprehension at the southern border, are quickly and efficiently removed (except if they have

demonstrated a credible fear of persecution or torture). DHS expects that the full use of expedited removal statutory authority will strengthen national security, diminish the number of illegal entries, and otherwise ensure the prompt removal of aliens apprehended in the United States. And it will further Congress's purpose for creating expedited removal procedures, which was "to expedite the removal from the United States of aliens who indisputably have no authorization to be admitted to the United States . . ." H.R. Rept. 104-828 at 209 (1996). Accordingly, immigration officers may now use expedited removal authority not only for those individuals apprehended at or near the border, but also for those individuals who evade detection at the border and are apprehended within two years thereafter anywhere within the United States.

C. Implementation Considerations

As in the case of the Previous Designations, immigration officers generally have broad discretion to apply expedited removal to individuals covered under the New Designation. See Matter of E-R-M- & L-R-M-, 25 I&N Dec. 520, 523 (BIA 2011) (holding that language in INA section 235(b)(1)(A)(i) does not limit DHS's discretion to place aliens amenable to expedited removal into removal proceedings under INA section 240). DHS recognizes that the circumstances of certain aliens, including aliens with serious medical conditions and aliens who have substantial connections to the United States, for example, may weigh against the discretionary use of expedited removal proceedings.³ Accordingly, in appropriate circumstances, and as an exercise of prosecutorial discretion, immigration officers, in their sole and unreviewable discretion, may permit certain aliens otherwise eligible for placement into expedited removal proceedings to return voluntarily, withdraw their applications for admission, or be placed in full removal proceedings

³ Trump v. Int'l Refugee Assistance Project, 582 U.S. ___, No. 16-1436, slip op. at 11 (noting that "foreign nationals abroad who have no connection to the United States at all" can be denied entry as such a denial does not "impose any legally relevant hardship" on the foreign nationals themselves).

under section 240 of the Act, in lieu of expedited removal. DHS plans to issue guidance to immigration officers to guide the exercise of discretion in referring aliens for expedited removal.

The expedited removal procedures required under existing law and regulations are applicable to the aliens designated by this Notice.⁴ As required by statute and regulation, any alien who falls within the New Designation, who is placed in expedited removal, and who indicates an intention to apply for asylum or expresses a fear of persecution or torture or a fear of return to his or her country, will be interviewed by an asylum officer who will determine whether the alien has a credible fear of persecution or torture. See INA section 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v); 8 CFR 235.3(b)(4), 208.30. DHS expects to continue to use the form I-867A/B, which includes questions officers must ask with respect to fear of return. Immigration officers are trained to be alert for indications that the alien may be afraid to return to his or her country. See INA section 235(b)(1)(E), 8 U.S.C. 1225(b)(1)(E).⁵ Aliens that express a fear of return are referred for an interview with an asylum officer. INA section 235(b)(1)(A)(ii); 8 U.S.C. 1225(b)(1)(A)(ii); 8 CFR 235.3(b)(4). Asylum officers determining that an alien has or has not established a credible fear are to provide a written record of the factual basis for their determination. See INA sections 235(b)(1)(B)(iii)(II), 8 U.S.C. 1225(b)(1)(B)(iii)(II).

If an asylum officer determines that the alien has established a credible fear of persecution or torture, the alien will be referred to an immigration judge for further consideration of the alien's application for asylum. INA section 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii); 8 CFR 208.30,

⁴ Under existing law, aliens wishing to apply for asylum are required by statute to do so within one year of entering the United States. INA section 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B). See also Convention relating to the Status of Refugees, art. 31(1), July 28, 1951, 189 U.N.T.S. 137, 174 (obliging refugees to "present themselves without delay to the authorities and show good cause for their illegal entry or presence").

⁵ As the New Designation will result in greater use of expedited removal by ICE immigration officers, ICE will also develop and deploy updated training on the use of this authority, including proper referral of aliens for credible fear screening.

235.6. If the officer determines that the alien has not established a credible fear of persecution or torture, the alien may request de novo review by an immigration judge of the officer's negative credible fear determination. See INA section 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III); 8 CFR 208.30(g), 1003.42, 1208.30, 1235.3(b)(4).

Similarly, all aliens placed in expedited removal as a result of the New Designation who claim lawful permanent resident, refugee, or asylee status, or U.S. citizenship will have the benefit of the same procedural safeguards that apply in all expedited removal proceedings. See INA section 242(e)(2); 8 CFR 235.3(b); 1235.3(b)(5).

D. This Notice Is Immediately Effective

In keeping with the practice followed in announcing the Previous Designations, and consistent with implementing regulations at 8 CFR 235.3(b)(1)(ii),⁶ this designation is effective without prior notice and comment or a delayed effective date. See, e.g., 67 FR 68923, 68925 (2002 Notice); 69 FR 48877, 48880 (2004 Notice); 82 FR 4769, 4769 (2017 elimination of exception for Cuban nationals arriving by air); 82 FR. 4902, 4902 (2017 elimination of exception for Cuban nationals encountered in the United States or arriving by sea). The rulemaking procedures of the APA do not apply to this Notice, because delaying the New Designation's implementation to allow public notice and comment would be impracticable, unnecessary, and contrary to the public interest. Cf. 5 U.S.C. 553(b)(3)(B) and (d)(3).

⁶ 8 CFR 235.3(b)(1)(ii) (providing that “[t]he Commissioner shall have the sole discretion to apply the provisions of section 235(b)(1) of the Act, at any time, to any class of aliens described in this section” and that this “designation shall become effective upon publication of a notice in the Federal Register” as well as that, “if the Commissioner determines, in the exercise of discretion, that the delay caused by publication would adversely affect the interests of the United States or the effective enforcement of the immigration laws, the Commissioner’s designation shall become effective immediately upon issuance, and shall be published in the Federal Register as soon as practicable thereafter” (emphasis added)).

Implementation of the New Designation is exempt from notice-and-comment requirements, because public notice and comment and the delay attendant thereon would be impracticable, unnecessary, and contrary to the public interest. See 5 U.S.C. 553(b)(B) and (d)(3). Congress explicitly authorized the Secretary of Homeland Security to designate categories of aliens to whom expedited removal may be applied on a case-by-case basis, and made clear that “[s]uch designation shall be in the sole and unreviewable discretion of the Secretary and may be modified at any time.” INA section 235(b)(1)(A)(iii)(I), 8 U.S.C. 1225(b)(1)(A)(iii)(I). As such, the Secretary’s designation is not required to go through notice-and-comment rulemaking. Indeed, the application of APA’s notice-and-comment requirements would defeat a major purpose of the expedited removal provision: to allow the Secretary to authorize immigration officers to respond rapidly, effectively, and flexibly to border security and public safety challenges, including urgent situations such as the present high number of aliens unlawfully entering and remaining in the United States and the lack of sufficient DHS resources to deal with these aliens. Consistent with the mandate of INA section 235(b)(1)(A)(iii)(I), 8 U.S.C. 1225(b)(1)(A)(iii)(I), that the Secretary may modify the scope of expedited removal under section 235(b)(1)(A)(iii) “at any time,” such designation “shall become effective upon publication of a notice in the Federal Register.” 8 CFR 235.3(b)(1)(ii) (noting that such designation where appropriate “shall become effective immediately upon issuance”). Accordingly, it is appropriate to publish such designation, effective immediately, without prior notice and comment.

Indeed, as in the cases of the Previous Designations, DHS is concerned that delayed implementation could lead to a surge in migration across the southern border during a notice-and-comment period. *See* 67 Fed. Reg. 68,924, 68,925; 82 Fed. Reg. 4902, 4904. “Such a surge would threaten national security and public safety by diverting valuable Government resources from

counterterrorism and homeland security responsibilities. A surge could also have a destabilizing effect on the region, thus weakening the security of the United States and threatening its international relations. Additionally, a surge could result in significant loss of human life.” 82 FR 4902, 4904.

In addition, DHS could not meaningfully implement INA section 235(b)(1)(A)(iii)(I), which establishes that the Secretary’s designation “may be modified at any time,” if such modification is not effective until after notice and comment rulemaking. The New Designation is necessary to remove from the United States inadmissible aliens not covered by a Previous Designation who are encountered less than two years after entering the United States without admission or parole.

Although DHS believes that pre-promulgation notice-and-comment procedures are neither statutorily mandated nor in the interests of the United States with respect to this Notice, DHS is interested in receiving comments from the public on all aspects of this Notice. DHS believes that by maintaining a dialogue with interested parties, DHS may be better positioned to ensure that it is even more effective in combating and deterring illegal entry, while at the same time providing for appropriate procedural safeguards for the individuals designated.

III. Notice of Designation of Aliens Subject to Expedited Removal

Pursuant to section 235(b)(1)(A)(iii) of the Immigration and Nationality Act (INA) and 8 CFR 235.3(b)(1)(ii), I order, in my sole and unreviewable discretion, as follows:

(1) Except as otherwise expressly provided, the Department of Homeland Security may place in expedited removal any or all members of the following class of aliens (other than unaccompanied alien children as defined in 6 U.S.C. 279(g)(2)) as determined by an immigration officer: Aliens who are inadmissible under sections 212(a)(6)(C) or (7) of the INA, who are physically present in

the United States without having been admitted or paroled following inspection by an immigration officer at a designated port of entry, and who either (a) did not arrive by sea, are encountered by an immigration officer anywhere in the United States more than 100 air miles from a U.S. international land border, and have not been physically present in the United States continuously for the two-year period immediately prior to the date of the determination of inadmissibility, or (b) did not arrive by sea, are encountered by an immigration officer within 100 air miles from a U.S. international land border, and have been physically present in the United States continuously at least 14 days but less than two years immediately prior to the date of the determination of inadmissibility. Each alien placed in expedited removal under this designation bears the affirmative burden to show to the satisfaction of an immigration officer that the alien has been present in the United States continuously for the relevant period. This designation does not apply to aliens who arrive at U.S. ports of entry, because those aliens are already subject to expedited removal. Nor does this designation apply to or otherwise affect aliens who satisfy the expedited removal criteria set forth in any of the previous designations. *See* 82 FR 4902, 69 FR 48877; 67 FR 68923 (collectively, the Previous Designations).

(2) Any alien who is placed in expedited removal under this designation who indicates an intention to apply for asylum or who expresses a fear of persecution or torture, or a fear of return to his or her country, will be interviewed by an asylum officer to determine whether such alien has a credible fear as defined in section 235(b)(1)(B)(v) of the INA, 8 U.S.C. 1225(b)(1)(B)(v). If the asylum officer determines that the alien has established a credible fear, the alien will be referred to an immigration judge for further consideration of his or her application for asylum in proceedings under section 240 of the INA, 8 U.S.C. 1229a.

(3) Any alien who is placed in expedited removal under this designation who claims lawful

permanent resident, refugee, or asylee status, or U.S. citizenship will be reviewed in accordance with the procedures provided in 8 CFR 235.3(b) and 8 CFR 1235.3(b).

(4) This Notice applies to aliens described in paragraph (1) on or after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

(5) This Notice does not supersede, abrogate, or amend or modify any of the Previous Designations, which shall remain in full force and effect in accordance with their respective terms.

SIGNED: at Washington, D.C., this 19th day of July, 2019.

Kevin K. McAleenan,

Acting Secretary of Homeland Security.

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